

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Modifications
to Proposed Department of Health
JUDGE

REPORT OF THE
ADMINISTRATIVE LAW

Rules Governing the Licensing of
Home Care Providers, Minnesota Rules,
Chapter 4668, and Establishing
License Fees, chapter 4669.

The above-entitled matter initially came on for hearing before Administrative Law Judge Peter C. Erickson on August 28, 29 and 30, 1991, in the Minnesota Department of Health Building, Minneapolis, Minnesota. As a result of that hearing, a recommendation was issued on October 22, 1991, that the proposed rules not be adopted at that time. The undersigned judge stated in Conclusion No. 3 that the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules resulted in rules which were substantially different from the proposed rules. Consequently, this judge stated in Conclusion No. 4 that the Department could either commence a new rulemaking proceeding with the modified rules or publish the modifications with an abbreviated notice scheduling a new hearing date to take testimony only on the modifications. The Department chose the second option and a hearing was held on October 21, 1992, in room 5 of the State Office Building, St. Paul, Minnesota. Although the hearing dealt only with the modifications proposed to the rules as initially published, the entire hearing record of the first proceeding was incorporated into the record of the second proceeding. This report will focus on the modifications to the proposed rules as published by the Department of Health in the State Register on September 14, 1992, at 17 S.R. 530-552. The initial report issued on these proposed rules is incorporated by reference herein.

The agency panel which appeared at the hearing was: Mary Absolon and Cecelia Weible, Assistant Directors of the Health Resources Division. Terry O'Brien, Special Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55103, appeared on behalf of the Department. Approximately 70 persons attended the hearing.

The Department must wait at least five working days before taking any final action on the rules; during that period, this Report must be made

available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of Health of actions which

will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, the Commissioner must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

I. On August 20, 1992,, the Department filed the following documents with the Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) The record from the August 28-30, 1991 hearing.
- (e) A supplementary Statement of Need and Reasonableness.
- (f) Comments on the rule received between October 1, 1991 and August 19, 1992.

2. On September 14, 1992, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 530-552.

3. On September 9, 1992, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the

Department for the purpose of receiving such notice.

4. At the commencement of the hearing, the Department introduced the following documents into the record:

(a) The Notice of Hearing as mailed.

- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules.

5. The period for submission of written comment and statements remained open through November 10, 1992, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on November 18, 1992, the third business day following the close of the comment period.

Statutory Authority

6. The statutory authority for adopting the proposed rules is fully set forth in the previous report. However, the judge does want to point out that the Legislature made significant changes to the statutory provisions which these proposed rules seek to implement during the 1992 session. Consequently, these proposed modifications, in part, reflect some of those statutory amendments. Those amendments can be found at 1992 Laws, Chapter 513, Art. VI and 1992 Laws, Chapter 595, 23 and 24. The judge additionally points out that the statutory amendments specifically address certain areas of concern raised in the last hearing and contained in the report issued on October 22, 1991.

Additional Modifications Made to the Proposed Rules by the Department

7. Subsequent to the hearing, and after a review of all of the oral testimony and written comments submitted, the Department has proposed further modifications to the rule as summarized below:

Part 4668.0003 Definitions. Subpart 3. Assisted living services.

"Assisted living services" means individualized home care aide tasks or home management tasks provided to Clients residents of a residential center in their living units, and provided either by the management of the residential center or by providers under contract with the management. In this subpart, "individualized" means chosen and designed specifically for each client's residents needs, rather than provided or offered to all clients residents regardless of their illnesses, disabilities, or physical conditions.

Part 4668.0003 Definitions. Subpart 35. Residential center

"Residential Center" means a building or complex of buildings in which clients residents rent or own distinct living units.

Part 4668.QQ20 Criminal Disqualifications of Applicants
Licensees and Staff. Subpart 15. Rehabilitation.

(2) If on probation, parole, or other conditional
release, the person submits a report from the person's
probation or parole agent that-is-satisfactory-to-the
commissioner.

Part 4668.0020 Criminal Disqualifications of Applicants,
licensees and Staff. Subpart 17. Reporting new criminal
information.

Subp. 17. Reporting undisclosed and new criminal
information.

Part 4668.0060 Administration. Subpart 1. Referrals.

home-care-provider, inpatient-facility.-or-other-health
Care
transfers a-client -of any-contagious- disease-to-which
the-client-is-known-to-have-been-exposed-on-which-the
Client-is-known-to-have-been-exposed

renumber the remaining subparts

Part 4668.0065 Infection Control. Subpart 1.
Tuberculosis screening.

A. the person must provide documentation of having
received a negative reaction to a Mantoux test
administered within the 12 months before working in a
position involving direct client contact, and no later
than every 24 months after the most recent first Mantoux
test; or

B. if the person has had a positive reaction to a
Mantoux test upon employment, or within two years before
working in a position involving direct client contact, or
has a positive reaction to a Mantoux test in repeat
testing during the course of employment, the person must
provide:

(1) documentation of a negative chest x-ray
administered within the three months before working
in a position involving direct client contact; or and

Part 4668.0100 Home Health Aide Tasks. Subpart 1. Home
health aide tasks.

B. performing routine delegated medical or nursing or
assigned therapy procedures, as provided by subpart 4,
except those items C through H;

Part 4668.0100 Home Health Aide Tasks. Subpart 5.
qualifications for persons who perform home health aide
tasks.

A person may only offer or perform home health aide
tasks, or be employed to perform home health aide tasks,
if unless the person has:

Part 4668.0110 Home Care Aide Tasks. Subpart 6. Class E
visits.

A Class E licensee must visit the client resident and
observe the provision of home care services every 60 days
after initiation of home care aide tasks . . .

Part 4668.0140 Service Agreement\$. Subpart 1. Service
agreements.

Any modification of the service agreement must be in
writing and agreed to be signed by the client or the
client's responsible person
the-client.

Part 4668.0160 Client Records. Subpart 4. Transfer of
client.

If a client transfers to another home care provider,
other health care practitioner or provider or is admitted
to an inpatient facility, the licensee, upon request of
the client, shall send a copy or summary of the client's
record to the new provider or facility or to the client.

Part 4668.0160 Client Records. Subpart 7.
Confidentiality.

B. to staff, contractors of the licensee, or other
health care provider, practitioner or inpatient facility
who require information in order to provide services to
the client, but only such information that is necessary
to the provision of services: . . .

Part 4668.0230. Subpart 5. Schedule of fine for
violations of rules.

(all following items
relettered); CCC part 4668.0160, subpart 7, \$350 \$250;

Part 4669.0040 Fee Limitation

A provider is subject to one license fee, regardless of
the number of distinct programs through which home care
services are provided unless the provider operates under
multiple units as set forth in part 4668.0012, subpart
2. A provider issued I class A and D license under
4668.0012, subpart 3. B. shall pay one license fee, The
fee shall be based on the total revenue of all home care
services.

Part 4669.0050 Fee Schedule. Subpart 4. Fees for medical equipment vendors.

Regardless of the class under which it is licensed, a provider whose principal business is of medical supplies and equipment shall pay a an annual fee of \$500.

The above modifications were made in response to oral testimony and written comments contained in the record herein. Except as may be specifically enumerated below, the Administrative Law Judge finds that the need for and reasonableness of each of the modifications has been demonstrated. None constitute a substantial change to the rules as recently published in the State Register.

Discussion of the Proposed Rules

8. In 1987, Minn. Stat. 144A.43 to 144A.49, the Home Care Licensure Law was enacted by the Minnesota Legislature. This new law expanded regulated services to include those that were non-medical in nature as well as home health care services already regulated on the federal level by Medicare. Pursuant to Minn. Stat. 144A.45, subd. 1, the Commissioner of Health was mandated to "adopt rules for the regulation of home care providers pursuant to sections 144A.43 to 144A.49." The proposed rules heard in August of 1991 and the modifications to those rules considered herein respond to that legislative directive. Additionally, as pointed out above, the Legislature has amended certain provisions of the Home Care Licensure Law to reduce or eliminate concerns raised during the first proceeding.

9. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of facts. The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn.App. 1985); *Blocker Outdoor Advertising Company v. Minnesota Department of Transportation*, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring

that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to a discussion of the proposed rules about which issues of need, reasonableness, or statutory authority have been raised. Because some sections of the proposed rules were not commented on negatively by the public and were adequately supported by the SONAR, a

detailed discussion of those sections is unnecessary. The Administrative Law

Judge specifically finds that the need for and reasonableness of the rule provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Proposed Rule 4668.0003 - Definitions

Subpart-2 - Ambulatory

10. Subpart 2 of proposed rule 4668.0003 was modified to add "transfer between locations" to the definition of "ambulatory." The Department intends for the change to clarify the meaning of the term, since the Department's use of the term is different from the casual, everyday meaning of the word. The Department intends to denote persons as "ambulatory" if they are capable of moving about without assistance. Thus, a person who moves about with the aid of a wheelchair, and can enter and exit the wheelchair without assistance, is considered ambulatory. A number of commenters objecting to the criterion of ambulation as inappropriate for determining whether care should be provided by Home Health Aides (HHAs) or Home Care Aides (HCAs). This issue will be addressed below where rule provisions containing that criterion are discussed.

The Department asserted that, in the nursing home case mix system, ambulation is divided into three activities for daily living (ADLs); walking, wheeling, and transfer. Supplemental SONAR, at 2. The language added to the definition clarifies that "ambulatory" does not distinguish between walking or moving with the aid of other devices. Rather, the rule provides that transfer must be within the individual's capability. The proposed language has been shown to be needed and reasonable to accurately reflect the Department's intended concept of "ambulatory."

Subpart 3 - Assisted Living Services

11. Subpart 3 defines "assisted living services." The definition is limited to individualized tasks provided by contract, not those services offered to all clients, regardless of the client's condition. The only comment related to this subpart is the suggestion by Catherine J. Barr, Director for Integrated Home Care, that "tasks" be replaced with the word "cares" throughout the rule. The Department did modify the rule to replace "resident" with the term "client." (see Finding 7). There is no confusion arising over what is meant by either "tasks" or "cares," however. Consequently, the subpart has been shown to be needed and reasonable.

Proposed rule 4668.0008 - Services Included In and Excluded From Licensure

12. Proposed rule 4668.0008 governs the licensure requirements that must be met by businesses which provide various services. The Department has established criteria to determine if a business provides direct services in subpart 2. Terms of service contracts with unlicensed businesses are regulated by subpart 3. Provider coordination businesses are excluded from licensure by subpart 4. Factors are established in subpart 5 to determine if a business is "regularly engaged" in providing home care services. Paraprofessionals are excluded from licensure by subpart 6. Subpart 7 excludes individual contractors from licensure. Government providers are included in the licensure system by subpart 8. Subpart 9 excludes instructional or incidental services from licensure.

Jackie McCormack, Family Service Coordinator of ARC Ramsey County (ARC) suggested that volunteers be excluded from licensure. The rules, when read as a whole, indicate that persons need be licensed only when they engage in the business of delivering home care services. Minn. Stat. 144A.43, subd. 4 defines "home care provider" as a person or other entity who renders services "for a fee" and thus excludes volunteers. Because the statutory mandate is controlling, the rule has been shown to be needed and reasonable.

Proposed Rule 4668.0009 - Exemptions for Regulated Programs

13. The 1991 version of these proposed rules contained an exemption for any provider already regulated by another state program, so long as the regulation was substantially the same as or exceeded that of the proposed rules. The Department proposes to delete this provision, part 4668.0009. The rationale offered for this action is as follows:

Minn. Stat. 144A.46, subd. 4 states that "in the exercise of the authority granted under sections 144A.43 to 144A.49, the Commissioner shall not duplicate or replace standards or requirements imposed under another state regulatory program." Because of this, and other provisions in part 4668.0008, providers that would be eligible for this exemption are already exempt or not considered home care providers, making part 4668.0009 unnecessary.

Supplemental SONAR, at 3.

Jan K. Luker, Director of Medical Rehabilitation/Education of Courage Center (Courage Center) and Lori Wething, Legal Counsel for Care Providers of Minnesota (Care Providers) objected to the deletion of part 4668.0009. Care Providers argued that programs licensed under existing rules should be allowed to demonstrate that duplication would occur if these rules were applied to the particular program. Retaining this rule part would, according to Care Providers, provide flexibility and allow a "continuum of care campus" to be established. Courage Center argued that omitting the rule exemption would encourage regulatory duplication. Courage Center suggested adding a 60 day timeframe for the Commissioner to respond to requests for exempt classification. No commenter identified any particular program requiring exemption under Minn. Stat. 144A.46, subd. 4 which is not addressed elsewhere in the rules.

The Department has identified a number of exempt programs in part 4668.0008 and expressly included other programs within the scope of regulation imposed by these rules. A rule cannot exceed any limitations imposed by statute. *Can Manufacturers Institute, Inc. v. State*, 289 N.W.2d 416, 425-26 (Minn. 1979). If a program is exempted expressly by this rule, the statutory prohibition against duplication is met. Programs expressly included under these rules must be assessed to determine if duplication occurs. The Department's criteria for establishing exemptions was found to be beyond the Department's statutory authority in the first report in this matter. However, the Department's subsequent proposal to rely on the statutory language itself,

rather than to adopt a new criteria to address the issue of duplication, squares with the authorizing statute. Although this choice may lead to other complications, such as an appeal as to whether a license should be required for any particular program, that does not constitute a defect in the proposed rules. The Judge finds that the need for and reasonableness of the proposed rule has been demonstrated.

Proposed Rule 4668.0012 - Licensure

14. Proposed rule 4668.0012 is composed of 18 subparts establishing classes of licenses, licensure criteria, and application procedures. Five classes of license are established, A through E, in subpart 3. The Department modified subpart 3, by excluding persons registered under Minn. Stat. 144A.461 who provide only home management tasks. This exclusion reflects the legislative directive to exclude those persons from licensure under these rules. 1992 Laws of Minnesota, Ch. 513, Art. 6, Sec. 8.

Care Providers and Brenda Menier, Director of Nursing Service of Polk County (Polk County), desired clarification and modification of the rules to expressly state that Class A licensees may provide Class D and E services. The Department responded by stating that "there are no limitations to the home care services that may be provided to consumers through the professional Class A license." Department Post-hearing Comment, at 3. If this issue is unclear, the Department should consider adding some clarifying language to the rule. However, as proposed, the Judge finds that the rule has been shown to be both needed and reasonable.

Proposed Rule 4668.0020 - Criminal Disqualification of Applicants, Licensees and Staff

15. Persons convicted of crimes are disqualified under proposed rule 4668.0020 from direct contact with clients in the clients' homes. The rule part establishes the procedure and standards by which the licensees and applicants must comply with the background investigation needs of the Department. The need to conduct background investigations has been established by the Legislature when it adopted statutory language which prohibits direct contact between a disqualified provider and client and expressly authorizes investigations to determine the status of a provider. 1992 Laws of Minnesota Chap. 513, Art. 6, Sec. 9. The statute reads:

All persons who have or will have direct contact with clients, including the home care provider, employees of the provider, and applicants for employment shall be required to disclose all criminal convictions.

The rules originally proposed in subpart 4 that owners and managers also disclose all criminal convictions but that subpart was deleted pursuant to the "direct contact" mandate referenced above. Additionally, licensees who have "direct contact" are included in the criminal history requirements by language added to subpart 8.

Becklund Care Centers objected to the burden placed upon employers by

subparts 8, 9 and 10 to conduct background investigations. These subparts require the employer to obtain signed disclosures from employees, remove disqualified employees from direct contact with clients, and, if reasonable cause exists, obtain a sworn authorization to search that employee's criminal history with law enforcement agencies. The Department maintains that the employer is the person with actual contact with employees or applicants for employment, and the employer has an interest in the integrity and background of employees and applicants. Removing a disqualified employee from direct client contact is required by statute, and therefore, requiring that result in subpart 9 does not impose any additional or unreasonable burden on employers.

Under subpart 10, "reasonable cause" is required before an employer can require a release form for a criminal background check from employees or applicants. The proposed rule states:

Examples of reasonable cause include, but are not limited to, information about criminal background on an individual from another provider, an employee, or a member of the public.

The phrase "include, but is not limited to" constitutes a defect in the proposed rules because it does not provide adequate notice as to what is included under the definition of "reasonable cause." See Beck, Bakken, and Muck, Minnesota Administrative Procedure, paragraph 24.8, p. 406 (Butterworth, 1987).

Further, examples are inappropriate for inclusion in the text of rules. The Department should either state the criteria in the rule which determine reasonable cause, or delete the sentence altogether. See in the Matter of the

Proposed Amendments to the Rules of the State Board of Animal Health, Governing Control of Pseudorabies, paragraph 32, p. 13 (ALJ Report, June 28, 1990).

Either method will cure the defect in this subpart. If the Department chooses to add criteria which defines "reasonable cause," an example of an appropriate definition can be found at Minn. Rule 9543.3060, subp. 2. Such a definition could read:

"Reasonable cause" means that information or circumstances exist which provide the commissioner or the licensee with an articulable suspicion that further pertinent information may exist concerning the employee or applicant.

The suggested language above would define "reasonable cause" by providing a standard, not examples. This standard is used in investigatory settings where a high level of prior knowledge is not a prerequisite. See In the Matter of the Proposed Adoption of Rules of the State Department of Human Services Governing Licensing; Background Studies, paragraph 31, p. 24 (ALJ Report, December 6, 1990). Defining reasonable cause is needed and reasonable to clarify when employers should be requiring more information concerning its employees or applicants. Although no specific standard was discussed in the rulemaking proceeding, the suggested language is narrower than the vague language it replaces. The new language does not constitute a substantial change from the rules as published in the State Register.

Proposed Rule 4668.0040 - Complaint Procedure.

16. Proposed rule part 4668.0040 establishes a procedure for clients and others to inform the licensee or the appropriate state agency of complaints regarding providers. The Department modified the rule to clarify that the Office of Health Facility Complaints was an appropriate "recipient" of complaints, rather than Department staff generally. The proposed rule, as modified, has been shown to be both needed and reasonable.

Proposed Rule 4668.0050 - Acceptance, Retention, and Discharge of Clients.

17. A licensee must have adequate staff to provide the contracted services before accepting clients pursuant to subpart 1 of proposed rule part 4668.0050. Subpart 2 requires the licensee to provide a list of home care providers upon discontinuing services to the client. Jackie McCormack, Family Service Coordinator for ARC Ramsey County (ARC) stated that its experience

with providers was that they do not comply with the "adequate staff" criterion. Time lines and notice provisions were suggested by ARC to protect clients from dislocation upon termination of services. Minnesota Association of Homes for the Aging (MAHA) suggested changes to subpart 2 to require the Department to provide more information about home care providers and specify the format for providers. The Department declined to make any changes. The Department maintains that Minn. Stat. 144A.47 specifies the Department's responsibilities and that providers can best tailor the list of providers for each client. The rule has been shown to be both needed and reasonable for the purpose of setting a standard for staffing and informing clients of other providers when needed.

Proposed Rule 4668.0060 - Administration.

18. Proposed rule part 4668.0060 contains seven subparts governing aspects of providing home care service to clients. The Department agreed to delete subpart I in response to comments from MAHA and Courage Center that the provisions were an invasion of privacy. ARC suggested that the rule was unclear and that back-up plans and monitoring was needed to assure adherence to the terms of service contracts. However, noncompliance with service contracts may amount to violation of these rules and the Office of Health Facility Complaints exists to respond to shortcomings of providers. Part 4668.0060, as modified, has been shown to be needed and reasonable.

Proposed Rule 4668.0065 - Infection Control.

19. Tuberculosis screening, exposure, and infection control training are addressed in the three subparts of proposed rule part 4668.0065. Persons who show positive on the Mantoux test are not permitted to have direct contact with clients. A number of commenters suggested that the rules did not state what impact a positive Mantoux test would have on current employees. The Department reiterated that no person who is contagious with tuberculosis can provide direct services and modified subpart 1(B) to clarify that intent. Subpart 1(A) was modified to clarify that tests must be administered within 24 months of the most recent Mantoux test.

Todd Monson, Program Manager of the Community Health Department of Hennepin County (Hennepin County), suggested that the focus of the rules on tuberculosis is too narrow, and other contagious diseases should be addressed. The Department responded that tuberculosis is currently a public health problem and that other infection control training is provided under subpart 3. Additionally, the individual service agreement can specify additional infection control measures as needed for the particular client. The Department has shown that proposed rule 4668.0065, as modified, is needed and reasonable.

Proposed Rule 4668.0100 - Home Health Aide Tasks.

20. Subpart I of proposed rule 4668.0100 allows registered nurses (RNs) and therapists to delegate appropriate tasks to home health aides (HHAs). The Department clarified that HHAs can perform all home care aide (HCA) tasks. Subpart I was also modified to state that A and D licensees proving HCA tasks

must be satisfy the training and supervision requirements of that rule, not proposed rule 4668.0110. A list of tasks which may be delegated is provided under items A and B. Item A was modified to allow administration of

medications, rather than assistance with that administration. Item B was clarified by indicating that only routine medical or nursing procedures or assigned therapy procedures could be performed by HHAS. Subpart 1(B) was also modified to address supervision concerns. That change will be discussed below.

21. The conditions under which HHAs can administer medications are set out in subpart 2. Both regularly scheduled and pro re nata (p.r.n., meaning "as needed") are included under the HHAs scope of responsibility. Virginia Rootkie, Director of the Pine County Public Health Nursing Service objected to HHAs being authorized to administer medications under any circumstances. Kathleen Pasqualini, Administrator of CarePlus HHA, Inc. maintained that the Department cannot place any restrictions on delegation that are not present in the Nursing Practices Act (Minn. Stat. Chap. 148). The Department pointed out that Minn. Stat. 148.171(3) authorizes RNs to delegate functions to other nursing personnel. The proposed rules are consistent with the statutory authority granted to RNs and have been shown to be needed and reasonable.

22. In subpart 9, the Department has proposed a system of supervision of HHAs which requires an initial visit within fourteen days of the orientation to ensure tasks are being properly performed. After the initial visit, two different standards apply for subsequent visits. The Department set a fourteen day supervision requirement for those tasks listed in subparts 2, 3 and 4. For those HHA tasks not listed in those subparts, a supervisory visit must be made by an RN, licensed practical nurse (LPN), or therapist must be made no more than every 60 days. Bridget Jodell; Susan K. Anderson, Staff Educator of In Home Health; Mary Ann Kult, Branch Manager of Kimberly Quality Care; Becklund Home Health Care; Judy Leivermann, Ridgeview Home Care Services; Katherine Lammers, Director of Nursing for Houston County Public Health Service; Colleen Wieck, Executive Director of the Governor's Planning Council on Developmental Disabilities; and Brenda L. Menier, Director of the Polk County Nursing Service strongly objected to the 14 day limit on supervisory visits. The commenters asserted that the applicable Medicare standard is 60 days which should be appropriate herein given the nature of the tasks performed by HHAs.

The Department responded to the objections, stating its reasons for setting the 14 day limit:

The Department agrees that for medication administration and delegated medical, nursing or therapy procedures that a more stringent supervision schedule is proposed. However inasmuch as 4668.0100, Subpart 1, items A and B describe tasks not routinely practiced by paraprofessionals as indicated by comments opposing medication administration and that these tasks are not required to be taught in a training program described under 4668.0130, the Department believes it is reasonable to establish a more stringent professional supervision schedule for these more sophisticated services. Since 4668.0100 does leave the decision of whether or not to delegate these tasks to the registered nurse or therapist and 4668.0100, subpart 9 applies the supervision schedule only when these are performed as home health aide tasks and no schedule of visits is imposed for the performance of services by a registered nurse or therapist when no delegation is occurring.

Department Comment, at 15 (emphasis in original).

In reexamining the wording of the rules, the Department recognized that some tasks might be included in the 14 day supervision requirement that are appropriate for 60 day supervision. To clarify what level of supervision is appropriate, the Department modified subpart 1(B) to exclude items C through H from the list of tasks delegated because items C through H are tasks normally performed by HHAs. The change clarifies when the 14 day supervisory requirement is imposed.

Under the ordinary scope of nursing practice or therapy, the RN or therapist would be present to perform the functions requiring 14 day supervision. Since delegation of these tasks to HHAs is allowed, the RN or therapist is relieved of attending daily to the client's needs. However, the functions delegated are ordinarily within the scope of RN practice. Therefore, the Department concluded some heightened degree of supervision is needed when these tasks are being routinely performed by HHAs. The 14 day period is adopted from the Medicare provision for supervision of skilled nursing tasks. SONAR, at 107 (citing 42 C.F.R. 484.36(d)). The Department concluded that the closest analogous care to delegated RN tasks was the 14 day Medicare standard for skilled nursing tasks.

The 60 day standard is the least restrictive supervision requirement presently imposed on HHAs. For Medicare-certified providers, the Department will not impose a stricter standard of supervision no matter what tasks are delegated. The Department adopted the 60 day standard for all HHA tasks which do not require delegation. The 60 day standard has been shown to be needed and reasonable. Additionally, the Department has demonstrated that a 14 day standard is needed and reasonable for delegated RN functions.

Proposed Rule 4668.0110 - Home Care Aide Tasks.

23. Home Care Aides (HCAs) provide important services to clients, but these services are not as technically demanding, nor do they require as much specialized training, as tasks provided at the HHA level. Proposed rule 4668.0110 reflects the less complex nature of HCA services. The training requirements of subparts 2 and 4 are less stringent than those of HHAs. After the initial check within 14 days, supervision of HCAs by an RN or LPN is required no later than every 60 days by subpart 5. The supervision requirement is consistent with the supervision required of HHAs for nondelegated tasks.

Pine County questioned whether the different regulations regarding HHAs and HCAs require a provider to list the tasks for each category for every client. The Department responded that the rules do not require such differentiation. Providers must ensure that the proper staffing is afforded to the client, based on individual needs.

24. Subpart 1 lists the tasks to be provided by HCAs and states that the subpart applies only to Class B, C, and E licensees. For example, the rule restricts the preparation of modified diets for clients to persons meeting the requirements of subpart 2 (for HCAs) or part 4668.0100, subpart 5 (for HHAs). By limiting the scope to the enumerated licensees, the rule does not restrict the rights of other persons who may lawfully provide that service.

MAHA expressed a concern that the rule was inconsistent by allowing home chores in cases of acute illness under item C of subpart I, but prohibiting personal care (such as bathing, grooming, and oral hygiene) when the client suffers from acute illness or infectious disease under item E. The Department responded that the different treatment was intended under the rules. The home chores allowed under item C are more complicated than ordinary care, but not beyond the capacity of an HCA. The personal care to be provided an acutely ill or contagious person, however, is properly within the scope of HHA tasks. This classification for licenses and HCAs that care properly within the scope of their training may not remain within those limits due to changes in the condition of the client is needed and reasonable.

Many of the persons receiving services which would be licensed under these rules objected to the distinction between persons who are ambulatory (and thereby may receive HCA services) and those who are not (and thereby receive no less than HHA services). They argued that ambulation is not a proper measure of the need for more highly trained individuals providing care. The Department responded as follows:

Because it is the Department's obligation under Minnesota Statutes 144.45, Subdivision 1 (c) to "establish standards of training of home care provider personnel, which may vary according to the nature of the services provided or the health status of the consumer" and not rely upon the subjective judgment of any one nurse on any given day, the Department believes it should retain this definition. However, the rule does not restrict a provider from utilizing, in addition to the "ambulatory criterion", the judgment of a nurse to determine clients served. As ability to move decreases the level of skill needed, the criterion is a reasonable one.

Department Comment, at 1.

The Judge finds that the Department has demonstrated the need for and reasonableness of the proposed rule. However, the Department may want to consider adding the following language to provide more flexibility in the rule:

The requirement that the client be ambulatory does not apply if a registered nurse determines that the home care aide can provide appropriate care and that determination is documented in the client's service agreement.

This modification, if made by the Department, would not constitute a

substantial change.

Proposed Rule-4668.0140 - Service Agreements.

25. Pine County; the Governor's Planning Council; Todd Monson; Susan Weisbrich; Ridgeview Home Care Services; Katherine Kopp; Integrated Home Care; Beckie Conway, Administrator of Presbyterian Homes of Minnesota; In Home Health; Staff Builders Health Care Services; Courage Center; and others objected to the client signature requirement in subpart I of proposed rule

4668.0140. They maintain that the provision is burdensome and creates an unnecessary cost to providers. Kimberly Quality Care suggested that if the Patient Bill of Rights language was used to ensure patients are adequately protected, no undue burden on providers would be imposed. The Department concurred with these comments and changed the rule to require consent of the client (or the client's responsible person), but not a signature. (See, Finding 7, above). The change must still be documented in writing in the service agreement. Subpart 1, as modified, accomplishes the two goals of documenting changes and ensuring that the client or the client's representative has consented to the change. The additional assurance of obtaining a signature is available to the licensee, but the timing of any visit to perform that function is left to the discretion of the licensees. The subpart, as modified, is needed and reasonable.

26. Pine County asserted that subpart 2(E)(5) places the provider in the position of telling clients when not to summon emergency medical services. The Department clarified that clients are always free to call for emergency medical services. Subpart 2(E)(5) is part of the contingency action plan between providers and clients that is intended to cover anticipated situations. Some needs will be foreseen and can be taken care of, without resort to emergency medical services. Those needs are to be listed in item E(5). Subpart 2 has been shown to be needed and reasonable.

Proposed Rule 4668.0160 - Client Records.

27. Katherine Kopp, Director of Housing for the Board of Social Ministry objected to summarizing visits in the client record, as required by subpart 6 of proposed rule 4668.0160, because it is overly burdensome. The Department stressed that only summarizing is required, not detailing every care provided to the client. Further, the Department justified the requirement due to the provider's need to document that the services were actually provided to the client. The Minnesota Home Care Association (MCHA) objected to Class C licensees being held to a lesser standard of "reporting." The Department noted that Class C licensees are individuals, not groups, and that the recordkeeping requirements of part 4668.0140 were reasonable for those licensees. Subpart 6 has been shown to be needed and reasonable as proposed.

Proposed Rule 4668.0180 - Class A Provider, Professional Home Care Agency.

28. Carol Laumer, Vice President of the Minnesota Association of Home Medical Equipment Suppliers, noted that medical equipment suppliers could fall under the definition of home care providers. Laumer urged the Department to expressly exempt those suppliers from the rules. The Department responded that, where home care services are provided, the rules will apply to medical equipment suppliers. The proposed rules, in part 4668.0180, subpart 2(1) explicitly recognizes provision of medical supplies when accompanied by a home care service as a Class A service. There is no evidence in the record to suggest that home care services provided by equipment suppliers should be treated differently than home care services provided by licensees. The

Department has demonstrated the need and reasonableness of including suppliers where they meet the definition of persons providing services.

29. Subpart 10 exempts providers from these rules, and several related rules, if they are Medicare certified by the Minnesota Department of Health acting on behalf of the United States Department of Health and Human

Services. Several commenters argued that the exemption should be broadened.

Ridgeview Home Care Services and Delrae M. Amann, Administrator of Midwest Home Health Care, Inc. maintained that as border providers, they are subject to overlapping surveys between Minnesota and their state of residence. Susan Weisbrich, Polk County, and Ridgeview Home Care Services argued that Medicare certification by entities other than the Department offer the same exemption from these rules.

The Department relied upon its legislative mandate to support the need for regulating and licensing providers. That statute states, in pertinent part, "the commissioner shall: (1) evaluate, monitor and license home care providers Minn. Stat. 144A.45, subd. 2(a)(1). As applied to this regulatory scheme, the Department has interpreted the obligation to license as the Commissioner's, which cannot be delegated to any other entity. Where a provider meets the Medicare standards as determined by the Department, a license is deemed granted. The important aspect is not the exact standard being met, but that the Commissioner, through the Department, is carrying out the evaluation that the applicable standard is being met. The Commissioner has chosen not to delegate this licensing authority to any other entity. This choice has been shown to be needed and reasonable to ensure that the licensing standards are evenly applied to providers. Any provider who is located near a border and opts to provide services in a nearby state must abide by the licensing rules of that location.

Proposed Rule 4668.0210 - Class D Provider, Hospice Program.

30. Proposed rule 4668.0120 establishes the standards for facilities providing hospice care. Such a facility must hold a Class D license pursuant to part 4668.0012 and Minn. Stat. 144A.48, A hospice program is exempt from certain standards under part 4668.0210 if the program is Medicare certified. The Medicare certification must be based on federal conditions of participation and the survey of compliance must be done by the Department. These provisions ensure that some standards apply to the hospice program and that the Department is the entity which determines compliance. As discussed above, that approach to licensure has been shown to be needed and reasonable.

Proposed Rule 4668.0220 - Surveys and investigations.

31. The Department conducts surveys to ensure that standards are being met in the day-to-day operation of licensees' businesses or programs. When complaints or other grounds exist, investigations are conducted to determine if rules are violated and if any adverse action should be taken. Subpart I coordinates the timing of surveys. Upon application or renewal of a license,

the Commissioner may choose to perform a survey. The discretion to perform a survey is limited to the time of application or renewal. This limitation is an adequate check on agency discretion. The rule language delays surveys for newly Medicare-certified licensees until the next Medicare survey. These provisions are consistent with the Department's intent to reduce duplication of regulatory burdens on providers and have been shown to be needed and reasonable.

Proposed RULE 4669.0030 - Procedure for Paying License Fee.

32. This proposed rule establishes criteria for the Commissioner to base a determination of whether applicants revenues should be verified by the

submission of documentation. The rule as proposed is needed and reasonable, but difficult to read. The Judge suggests the following:

The commissioner shall require each applicant to verify its revenues ... on which the fee is based if either:

A. the commissioner has received_inforMation that a revenue report may be inaccurate; or

B. the provider has been randomly elected for Compliance verification.

The Department is not required to make this change. The new language is suggested merely to improve the readability of the rule. The suggested language does not constitute a substantial change.

Proposed Rule 4669.0040 - Fee Limitation.

33. Some commenters questioned whether providers offering different levels of service need multiple classes of license; whether multiple fees need be paid for multiple licensing. Proposed rule 4669.0040 states that a provider must pay only one license fee unless the Commissioner has determined that multiple units are being operated. The standards which control that determination are found at part 4668.0012, subpart 2. Since multiple units are, by definition, administratively discrete so they require individual licenses, the costs of issuing those licenses is appropriate to pass on to the applicants. The Department added language to state that when Class A and D licenses are issued to the same provider, only one fee is charged. Proposed rule part 4669.0040 has been shown to be both needed and reasonable, as modified. The modification clarifies the application of the rule and does not constitute a substantial change.

Proposed Rule 4669.0050 - Fee Schedule.

34. Polk County, Pine County, Houston County, St. Cloud Hospital, and Kimberly Quality Care objected to the fee schedule established in subpart 1 for Class A, B, and D license application and renewals. The schedule sets a descending scale of fees based on the revenue of the provider. The top fee is \$4,000, where revenues are greater than \$1,500,000. The lowest fee is \$100, where revenues are \$25,000 or less. The objections focused on the highest license fee and commenters argued that \$4,000 was too high, particularly when compared with fees imposed in other states. The Department's system is designed to impose higher absolute costs on applicants which have larger operations and are likely to require more effort by the Department in processing the license application or renewal. The percentage of revenue reflected by these fees is lower at the top end (0.2666% or less for the \$4,000 fee) than at the bottom (0.4% or more for the \$100 fee).

The Department has listed its projected budget and the funds expected to be generated under the proposed fee structure. SONAR, at 173 and Appendix 4. The fee is calculated to, in the aggregate, cover the budgeted expenses incurred by the Department for processing applications. No commenter suggested that the Department's estimated expenses were excessive or unreasonable. Subpart 1 has been shown to be both needed and reasonable.

35. Subpart 4 requires fees from medical equipment suppliers. The Department recognized that many suppliers do not provide home care services and thereby would not fall under these rules. To reflect the limitations of the rule, the Department modified the subpart to clarify that the fee applies to providers whose primary business is medical equipment supply. The Department also expressly stated that the fee was an annual fee. The subpart has been shown to be needed and reasonable to include home service providers who are medical equipment suppliers.

Excluding Personal Care Aides From Licensure

36. A large number of persons utilizing home services asserted that personal care aides (PCAs) should be exempt from licensing under these rules. These commenters base this position on their positive experiences in receiving services from PCAs. Minn. Stat. 144A.46, subd. 2, as amended in 1992, expressly exempts certain categories of PCAs from licensure as a home care provider. 1992 Laws of Minnesota, Chap. 513, Art. 6, Sec. 8. These rules cannot impinge on those statutory exemptions. However, any category of PCA not mentioned in that list is required to be licensed pursuant to statute as a home care provider.

Based upon the foregoing Findings of Fact, the Administrative law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Health (the Department) gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding 15.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusion 3 as noted at Finding 15.

7. Due to Conclusions 3 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this day of December, 1992.

PETER C. ERICKSON
Administrative Law Judge

Reported: Taped (no transcript)